No. 80-281

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In the Supreme Court of the United States

OCTOBER TERM, 1979

OKC CORP., PETITIONER

v.

HAROLD M. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the examination by the Securities and Exchange Commission of the contents of a report prepared for corporate purposes violated the corporation's Fourth Amendment rights, where private parties had thoroughly reviewed the report before voluntarily deciding to turn it over to the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is reported at 614 F. 2d 58. The order denying rehearing (Pet. App. A8-A10) is reported at 617 F. 2d 1207. The February 22, 1979, opinion of the district court granting partial summary judgment in favor of respondents (Pet. App. B39-B44) is not officially reported; it is unofficially published at [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,790. Four other opinions of the district court are included in the appendix to the petition; one of these opinions (Pet. App. B8-B33) is reported at 461 F. Supp. 540; another (Pet. App. B34-B38) is unofficially published at [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,773.

JURISDICTION

The judgment of the court of appeals (Pet. App. C2) was entered on March 19, 1980. A petition for rehearing was denied on May 30, 1980 (Pet. App. A8-A10). The petition for a writ of certiorari was filed on August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, OKC Corp. ("OKC"), was, until recently, the subject of an investigation by the Securities and Exchange Commission ("Commission") for possible violations of the federal securities laws.[1] On August 15, 1978, OKC filed this action in the United States District

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[1]The Commission concluded its investigation of OKC and, on September 15, 1980, filed an injunctive action against the company and its chief executive officer, Cloyce K. Box, alleging violations of the antifraud, proxy and reporting provisions of the federal securities laws uncovered by the Commission in its investigation. *SEC* v. *Cloyce K. Box & OKC Corp.*, CA3-78-1217-D (N.D. Tex.).

Court for the Northern District of Texas against the Commission, its five members, and nine of its employees, seeking an injunction against the Commission's investigation and $15 million in damages (Pet. App. B10-B12). OKC alleged that Commission officials, acting either alone or in concert with officials of the United States Department of Energy, illegally obtained a copy of a report, prepared by an outside law firm for a special committee of OKC's board of directors, detailing various questionable business transactions and management practices engaged in by OKC (*id.* at B8-B9, B10, B42-B43). OKC contended that this document, which formed the initial basis for the Commission's inquiry, was stolen from its corporate files by several of its employees, and that the Commission, by allegedly instigating or otherwise participating in the taking of the report, violated OKC's Fourth Amendment rights.

After extensive discovery on the issue of the Commission's knowledge of and involvement in the alleged theft of the report, the district court found the pertinent facts to be "undisputed" (Pet. App. B35):

> At OKC's board of directors meeting on November 1, 1977, the decision was made to distribute copies of the report to all board members. A member of the board, Gary Adams, received his copy of the report in the mail a few days later. No cover letter instructing Adams as to any limitation on his use of the document accompanied it. Adams turned the report over to Wade, an OKC employee. A copy of this report was made and voluntarily exchanged among Wade, David Ownby [a former OKC employee] and Tom Patrick [an OKC employee]. Ownby and Patrick later delivered it to the Commission.

Based upon the record, which included "testimony from virtually any person in government in any manner connected to these facts" (Pet. App. B44), the district court concluded that there was no genuine issue as to the fact that Commission staff members had no involvement in any alleged "private party taking" of the report, either directly or through the Department of Energy.[2] Since there was no evidence that the Commission had any "prior connection with, knowledge of, or participation in" the alleged private party seizure, the district court, citing *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), granted partial summary judgment for respondents limited to OKC's Fourth Amendment claim (Pet. App. B43-B44).

The court of appeals affirmed (Pet. App. A2-A7). It "agree[d] with the district court that there were no genuine issues of disputed fact concerning SEC participation in the alleged private party taking, either directly or by linkage with DOE" (*id.* at A6).

ARGUMENT

1. In the courts below petitioner principally claimed that the Commission had been implicated in the private party taking of the report and that the seizure therefore violated its rights under the Fourth Amendment. Both courts rejected this claim on the ground that the evidence showed that the Commission did not participate either directly or indirectly in the alleged private party taking, and petitioner does not contest the courts' conclusions on this point.

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[2]The district court found that there had been no theft of the report at all (Pet. App. B34-B38), but concluded that this finding was unnecessary to support its ruling that there was no factual issue as to the legality of the Commission's actions (*id.* at B41-B44).

Instead, relying on *Walter* v. *United States*, No. 79-67 (June 20, 1980), petitioner now contends (Pet. 8) that the warrantless inspection of the report by Commission employees violated OKC's Fourth Amendment rights. Because this contention was not addressed by the courts below, however, there is no merit to petitioner's claim that the court of appeals' decision conflicts with this Court's judgment in *Walter*.[3]

In any event, petitioner's reliance on *Walter* is misplaced. In *Walter*, a private party gave FBI agents certain film containers that, from their exterior packaging, appeared to contain obscene pictures. The private party from whom the FBI obtained the film containers had not viewed the films. The FBI, without first obtaining a search warrant, viewed the films with a projector and found them to contain obscene material; the films formed the basis for the defendants' prosecution and conviction for violations of federal obscenity laws. This Court reversed the convictions in three separate opinions, none of which commanded a majority vote.[4]

The Court first reaffirmed the principle established in *Burdeau* v. *McDowell*, *supra*, that "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use

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[3]Petitioner has recently moved in the district court for vacation of the partial summary judgment, pursuant to Fed. R. Civ. P. 54(b) and 83. In that motion petitioner has argued that the examination of the report by Commission officials without obtaining a warrant violated the Fourth Amendment. In these circumstances, petitioner should pursue its claim for relief in the lower courts before seeking review of this issue in this Court.

[4]Mr. Justice Marshall concurred in the judgment without opinion.

evidence that it has acquired lawfully." *Walter* v. *United States, supra,* slip op. 6 (opinion of Stevens, J.). See also *id.* at 2 (White, J., concurring); *id.* at 1 (Blackmun, J., dissenting). In his opinion announcing the judgment of the Court, Mr. Justice Stevens remarked (slip op. 6) that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." However, because the private party in *Walter* had not actually viewed the films, Mr. Justice Stevens concluded that the projection of the films by the FBI agents "was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search" (slip op. 7), and that the separate search, which was not supported by a warrant or justified by one of the exceptions to the warrant requirement, infringed the defendants' legitimate expectations of privacy, in violation of the Fourth Amendment. Mr. Justice Stevens found it unnecessary to decide whether the government would have been required to obtain a warrant had the private party first viewed the films. Slip op. 7 n.9.[5] In his concurring opinion, Mr. Justice White concluded (slip op. 3) that "the Government's subsequent screening of the films constituted an independent, governmental search that would have infringed [the defendants'] Fourth Amendment interests without regard to any previous screening by private parties." The four dissenting Justices concluded that, under the peculiar facts presented, the government's screening of the films did not intrude upon the defendants' legitimate expectations of privacy. The

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[5]Mr. Justice Stevens noted, however, that a third party's inspection of papers or books could be so complete that there would be no additional search by the government when it reexamines the materials. Slip op. 9 n.14.

dissenters also disagreed with Mr. Justice White's conclusion that a third party's screening of the films would not have destroyed the defendants' privacy interests in them. *Id.* at 3 n.2 (Blackmun, J., dissenting).

In this case, unlike in *Walter*, the record establishes that petitioner had no remaining privacy interest in the contents of the report at the time the report was delivered to the Commission. The report had been disseminated to and read by individuals inside and outside the corporation. In addition, the private parties who obtained the report and delivered it to the Commission had thoroughly read the report, reviewed and discussed its contents, and decided on their own that it described possible securities laws violations.[6] Assuming that petitioner had a legitimate expectation of privacy in the report, that expectation was frustrated in its entirety by the private parties' inspection. Since the scope of the Commission's examination of the report was no greater than that of the private parties, there is nothing in this Court's disposition of *Walter* that suggests that

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[6]See, *e.g.*, Deposition of David Ownby, January 10, 1979, at 58-70, 71-73; Deposition of Tom Patrick, January 12, 1979, at 76-77; *in camera* testimony of Patrick and Ownby on December 16, 1978, at 4-7, 92; Deposition of Bill Wade, January 4, 1979, at 57-58 (Vol. I), January 12, 1979, at 130-133 (Vol. II).

Moreover, it is clear from the testimony of Ownby and Patrick, the two individuals who delivered the report to the Commission, that the Commission could have obtained information indicating possible securities laws violations from these individuals' own statements based on their personal knowledge. See, *e.g.*, *in camera* testimony, *supra*, at 13, 30-31; see also Deposition of Wade, January 12, 1979, *supra*, at 120-121 (Vol. II).

petitioner's Fourth Amendment rights were violated by the Commission's actions here.[7]

2. Petitioner also contends (Pet. 8-11) that any use of the report by the Commission is impermissible because the report is privileged matter. This contention is premature.[8] In one of its interlocutory orders the district court expressed the view that the privileged nature of a document could bear upon the reasonableness of its seizure under the Fourth Amendment (Pet. App. B28-B31). But the district court noted that it was not "deciding the reasonableness of the seizure; the question is the government's participation in the seizure" (*id.* at B30). Having subsequently found no governmental participation in any seizure, the district court found it unnecessary to consider the issue of privilege. The court of appeals, in denying rehearing, emphasized that the claim of privilege was not presented in OKC's appeal from the partial summary judgment (Pet. App. A10). Accordingly, the issue is not properly presented to this Court.

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[7]Moreover, even if the Commission's perusal of the report violated the Fourth Amendment, petitioner would, in any event, not be entitled to invoke the exclusionary rule to bar the Commission's use of the report during the investigatory proceeding. See *United States* v. *Calandra,* 414 U.S. 338, 349-352 (1974).

[8]The Commission does not concede that the report is, or ever was, protected by any privilege (Pet. App. B13-B14). We note that this case does not involve any issue as to whether the Commission may subpoena privileged material. *Reisman* v. *Caplin,* 375 U.S. 440, 445 (1964). Nor is there any issue as to whether the Commission may use privileged material as evidence against petitioner in an adjudicatory proceeding. Petitioner is, of course, free to raise any issue of privilege in the injunctive action now pending before the district court. See note 1, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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